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Theoretical Analysis of the Facets of Competition Law

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EXECUTIVE SUMMARY

Competition Law is rooted in theoretical liberal economic philosophy. The pros and cons of this philosophy shall be present as with any theory within the corpus of Competition Law. American approach towards Competition Law is more open and less interested in state intervention with focus on consumer welfare. On the other hand, European view the Competition Law as more important to keep the market at a level playing field. For the purpose of identifying solutions to improve Competition Act 2010, the philosophical underpinning of the theory needs to be chalked out to provide following recommendations for plugging the gaps in the Competition Act 2010:

- Legal tests need to be devised to balance the idea of providing exemptions in the cases of consumer welfare and level playing market field
- State Powers need to be curtailed in relation to these exemptions
- Consumer Welfare must not be at the cost of the labour protections and privacy protections

About the Author

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Introduction

In modern times, rapid changes are occurring in this world especially with the advent of technologies such as digital appliances. The way these new technologies operate is quite different and there is a debate that competition law is losing its relevance. In this brief, the focus shall be to understand the benefits of the competition law as well as its disadvantages. In light of this theoretical analysis, recommendations shall be provided within Competition Act 2010.

Productive efficiency and Allocative efficiency

Competition law is generally based on a certain presumption through which a perfect competition can be reached. Although, it is generally not completely attainable, but it does make some strides toward it. Thus, an allocative efficiency can be reached through which resources are allocated in the most efficient way where the marginal revenue is equal to marginal cost. Similarly, it also results in a situation where the goods and services can be produced without any incurrence of any new costs as well as risks are produced at the lowest cost. Therefore, the consumer pays the price which is lowest and scarcity as well as speculation does not occur to those extreme rates. [1]

The metric to analyze competition is case-by-case basis

The competition law also has reasonable flexibility and all the tools generally used to consider state intervention such as determination of market power is in the light of the market conditions. Section 2(e) of the Competition Act 2010 (the "CA") considers an 'undertaking' dominant if it possess above 40% of the market share but an undertaking can also be considered dominant below that particular market share in specific circumstances. Therefore, factors such as trade barriers, sunk costs, taxation, access to natural resources, goodwill are also considered while determining dominant positions. The three competitive constraints such as actual competitors, potential competitors, actual competitors' ability to expand and some customers having overwhelming bargain strength are also considered.[2] Thus, as held in *Aberdeem*, the evidence to support a particular matter shall be both objective and subjective.[3] Natural

[1] Rhoda L Smith, 'Economic Efficiency' (*Concurrences*)
[2] 'The Concept of Potential Competition', Discussion Paper (*OECD,* 2021*)*
[3] *Aberdeem Journals Ltd v. OFT, Competition Appeal Tribunal* [2003] CAT 11

competitive process which can be hacked through sunk costs, trade barriers, new technology and access to natural resources are controlled through state intervention.

Prevention of monopoly and state writ

Competition Law basically prevents the creation of monopoly i.e., an undertaking can raise prices without any effect on its profitability. An undertaking realize that people are dependent on it and cannot escape its clutches, therefore, it can act in ways which are mentioned in the section 4(2) of CA. It must be noted that raising prices also means restricting output and or reducing innovation in the market. Thus, a monopoly can afford to not only share market with small producers to give them a blanket profit sharing but also reduce quality of the overall evolution of products and act as blockhead to the progress of market. In this way, it becomes so big that it can even challenge state since it would have enough capital and resources while also exploiting the citizenry.[4] Therefore, this whole concept goes against the basic precept of the state formation which is to protect its citizen from the state of nature and is in a social contract with its citizens. An example of this is Facebook which has used the inapplicability of competition law on it to enter into new businesses based on its premium of another business and even disrupted the election process.[5]

Bias toward caution

It is no doubt that competition law has evolved through centuries of experience. It has definite set of rules which are provided through CA, Treaty on the Functioning of European Union (the "TEFU") and numerous case-laws. Any decision which attempts to minimize state intervention will result in a void which will require numerous answers. There could also be a total chaos in such a situation. There are many areas where competition law provides explicit rules. For instance: it defines relevant market to include both geographical market and product market. For the former, it considers similar market climate and the areas in which the provision of goods and resources are provided.[6] For the latter, it considers supply side substitutability and demand side

[4] David h. Reichenberg and Stephen Libowsky, 'Monopoly' (*Concurrences*)
[5] Carole Cadwalladr, 'Revealed: 50 Million Facebook Profiles Harvested in Cambridge Analytica in Major Data Breach' (*Guardian*, 17th March 2018)
[6] *Volvo/Scania* Regulation Case No. Comp/M.1672

to be considered while defining it in addition to providing an interchangeability test.[7] Similarly, in considering undertakings, the legal position is quite explicit that any natural or legal person which engages in economic activity regardless of the structuring or financing.[8] For consideration of the prohibited agreement, section 4 of CA and section 101(1) of TEFU clearly lists down the relevant practices which shall come within the prohibited agreements and which restricts, prohibits or distorts competition. For this purpose, only a concurrence of will is required.[9]

In summation, it can be argued that competition law provides sufficient flexibility as well as certainty for a business to thrive and not to restrict their outputs. In fact, through this certainty of regime, the businesses all over the world has seen considerable growth in the last century and there is no reason to dismantle this system as a sufficient proportion of consumers have benefited by considerable increase of living standards and choice. Areas where there is some conflict with consumer protection and welfare, competition law itself provides exceptions. For example: article 9 of CA allows block-exemptions where there is some intention of improvement in production and distribution systems as well as there is a plan to promote technical or economic progress while allowing consumers fair share of benefits. In these case, though, the benefits must clearly outweigh the adverse effect of absence or lessening competition. Similarly, the agreements for improving conditions of workers are also not considered prohibited agreements.

Restricts innovation

Excessive competition ensured through competition laws results in almost a survival like position for most businesses. As a result, the businesses can compromise on quality and innovation.[10] They can hire low quality labour and commit violations of labour rights through sub-contracting as well as spend less money on research and development. When this situation is replicated over a vast market with time, the quality

[7] *Tetra Pak 1, European Commission* [1991] F.S.R. 654*; Continental Can v. Commission* [1973] Case 6-72*; United Brands v. Commission* Case 27/76
[8] *Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] ECR8089
[9] *Volkswagen v. Commission Case* T-62/98
[10] Competition and Innovation, Part I: a theoretical perspective – Background Note, (*OECD,* 2023)

and choice of products can considerably decrease, and the consumer welfare and worker welfare is reduced.

Zero pricing, network effects and digital technology

With the advent of digital technology, there is a new concept called zero pricing. In simple terms, it means that one is not paying for the product. The Chicago school of thought in USA which is dominant to regulate competition considers this as a consumer welfare and does not desire to regulate it. However, Competition Law ignores that the consumer itself is the price here and the data of the consumer is used in unwarranted advertising causing privacy to be infringed. Moreover, these technologies only grow when they have sufficient network effects meaning that when they have captured more than 50% of market in order to make a profit.[11] Competition law has no definite answer yet to these situations.

Bias toward State Owned Enterprises

The traditional system of competition law is also heavily biased in favour of government. It allows government to exercise public powers and essential services to create a monopoly itself. Thus, in most of the economies, rights such as mobility and areas such as defence and communications are heavily monopolized by the state. In *Eurocontrol,* the economic activity though charging for services was within the realm of state – controlled organization, but it was not considered 'undertaking'.[12] Thus, the Competition Commission must not have a bias toward government.

Ease of Doing Business

It is also argued that competition laws are too intrusive which deters businesses to work in a free manner. Many powers are provided to the commission and courts. Many tests are also extremely vague. For instance: In *Ford-AG*, although an agreement between parent entity and subsidiary is not considered as an agreement between undertakings, it was still considered a prohibited agreement. Similarly, the concept of

[11] Competition Competence Report Autumn 2016/2, 'Differences in Schools of Thoughts on Protecting Competition' (European Union) 1
[12] SELEX Sistemi Integrati SpA Commission, ECJ (Second Chamber), Judgment of 26 March 2009, C-113/07 P

unilateral act is also too vague.[13] In *Bayer and Volkswagen*, it was held that the concurrence of will is required with tacit acquiesce or explicit acceptance to from an agreement but at the same time it disallows a unilateral act to be considered as not an agreement if the undertaking continues accepting supplies.[14] Similarly, in *Bananas* case, the mere presence of an undertaking in a meeting makes one complicit of a concerted practice when the exchange of information could be in the eyes of undertaking as simple business exchange. The determination of intention is also not considered relevant here as involving yourself in an association resolution or a meeting is presumed to be your intention.[15] The test to disassociate publicly from these meetings is generally too hard when the determination of concerted practice is too thin. Alternatively, in UK case of *JJB sports*, the indirect sharing was considered concerted practice. In such a case, the criteria become too hard again.[16] All of this legal corpus gives clear result that such rules provides the government first seat at the table and the government shall play on the vagueness of the rules. This deters business and the hope of perfect competition.

Recommendations

- Section 5 and Section 6 of CA provides considerable powers to the Competition Commission to provide individual exemptions without any specific criteria or test for these exemptions within CA except the tests provided within section 9 of the CA. These arbitrary powers does not clearly require the Commission to consider the inherent danger of a dominant position even if that dominance provides consumer welfare. Moreover, it further gives weightage to the argument against Competition Law that it provides considerable leeway to the State in terms of regulation. For this purpose, CA needs to clarify that exemptions shall not apply if it provides a considerable dominant position to an entity even if the consumer welfare is increased according to the metric used by the Competition Commission.
- Section 9 of the CA must provide a clarification regarding the concept of zero pricing. In the contemporary digital evolution, since digital companies charge

[13] *Ford Werke AG and Ford of the Europe Inc v. Commission* C-25/84 and 26/84
[14] *Commission v. Bayer AG* T – 41/96
[15] *United Brands v. Commission, ECJ (1976)* Case 27/76
[16] *JBB Sports plc v. Office of Fair trading* [2004] CAT 17

no price in term of monetary value but charge in terms of data, the idea of consumer welfare becomes inherently problematic. CA must provide a stipulation within the Act which clarify the position of the Pakistani legal corpus on this issue.

- Section 9 (c) of the CA which provides for an exemption that can be applied if the benefits outweigh the harms should be narrowly tailored. It should clarify that benefits to the consumer cannot be at the cost of the violations or side – stepping of any labour law as well as privacy laws.
- It is recommended that the term of 'concerted practices' is also well defined within the CA on the model of TEFU. The term "concerted practice" clearly provides a safety-net for those vague cases which are not completely within the ambit of the Prohibited Practices but have a shadow of it. Its aim would be to ensnare "colluders" not otherwise caught by the prohibited practices.[17]

[17] Amira Ghaffar, ' Concerted Practices' (*Concurrences*)